Spillman Company *and* Sheet Metal Workers' International Association, Local Union No. 24, AFL–CIO. Case 9–CA–29432

May 19, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On December 18, 1992, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

In its exceptions, the Respondent contends, as it did to the judge, that it withdrew recognition from the Union pursuant to a reasonably based good-faith doubt of the Union's majority status. To support its position, the Respondent relies on *Southern Wipers, Inc*., 192 NLRB 816 (1971). Like the judge, we reject the Respondent's position. In *Southern Wipers*, the parties ceased bargaining for approximately 7 months. During this time, the union had no contact with employees, several of whom indicated to the employer that they were glad that the union had left. Simultaneously, the employer experienced heavy turnover of employees. The Board, in finding that the employer's withdrawal of recognition was not unlawful, concluded that the employer established a good-faith doubt based on objective considerations.

Significantly, in this case, unlike *Southern Wipers*, there is no evidence that the Respondent's employees expressed to the Respondent dissatisfaction with the Union. The parties stipulated: ''Between July 1, 1991, and January 27, 1992, no employees of Respondent expressed to Respondent the desire that the Union no longer represent them.'' This factor is critical. We require that an employer come forward with specific evidence of employee dissatisfaction with the union, and we will not rely on unsupported assumptions in this regard. See, e.g., *R.J.B. Knits*, 309 NLRB 201, 205 (IV. Analysis) (1992), and cases cited. Moreover, it is this sort of evidence, totally absent here, which an employer must have if the employer relies on employee turnover to support the employer's good-faith doubt of a union's majority status. See, e.g., *Pennex Aluminium Corp*., 288 NLRB 439, 441 (1988). This is so because we have adopted a rebuttable presumption that newly hired employees will support a union in the same ratio as the employees they replace. See *Colson Equipment*, 257 NLRB 78, 79 (1981), enfd. in relevant part 673 F.2d 221 (8th Cir. 1982).

Here, the Respondent urges that employee turnover is a factor in its reasonably based good-faith doubt of the Union's majority status. The Respondent also excepts to the specific numbers used by the judge in establishing employee turnover, and the General Counsel in his answering brief, joins this dispute.[2] We find it unnecessary to resolve this dispute over numbers. As indicated above, in the absence of evidence that employees expressed dissatisfaction with the Union, the Respondent's reliance on employee turnover fails. In this case, there is nothing to rebut the presumption that the Respondent's newly hired employees supported the Union in the same ratio as the employees they replaced.

In asserting its reasonably based good-faith doubt of the Union's majority status, the Respondent also relies on the bargaining hiatus and the Union's failure to hold meetings with the employees. These factors, like the employee turnover, do not help the Respondent. The 6-month bargaining hiatus is not a sufficient objective consideration on which to base a good-faith doubt of majority support. See *King Soopers, Inc*., 295 NLRB 35, 38 fn. 11 (1989) (4-month bargaining hiatus). The Union's failure to meet with the employees is also inadequate as an objective consideration. We have found union inactivity for much longer periods than the 6 months at issue here to be insufficient to support an employer's good-faith doubt. See *Flex Plastics*, 262 NLRB 651, 657 (1982), enfd. 726 F.2d 272 (6th Cir. 1984), and cases cited. Moreover, the Union's reassertion of its bargaining rights in January 1992, ne-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge found that ''[o]f the 17 employees who were on Respondent's payroll in January when the Respondent withdrew recognition, seven or 40 percent were employees at the time of the Union's certification.'' Both the Respondent in its exceptions and the General Counsel in his answering brief agree that the correct figure for the total number of employees at the time of withdrawal is 17. The General Counsel also agrees with the judge that seven of these employees had been on the payroll when the Union was certified. However, the General Counsel computes the percentage as 38.89 percent rather than the 40 percent found by the judge. The Respondent contends that only six employees working in January were on the payroll when the Union was certified, which is 31.5 percent. The Respondent excludes Ronald Riddle who was on sick leave at the time of the certification. Thomas Coniglio, the Respondent's vice president and general manager, stated at the hearing that Riddle was possibly still on sick leave at that time. He also testified twice that Riddle was no longer employed.

gated any inference to be drawn from the preceding period of inactivity. See *Pioneer Inn & Pioneer Inn Casino*, 228 NLRB 1263, 1264 (1977), enfd. 578 F.2d 835 (9th Cir. 1978). Accordingly, we adopt the judge's decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Spillman Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Deborah Jacobson and *Joseph Devine, Esqs.*, for the General Counsel.
Jerry Spicer, Esq. (Snyder, Rakay & Spicer), of Dayton, Ohio, for the Respondent.
Gregory B. Scott and *Catherine Adams, Esqs. (Squire, Sanders & Dempsey)*, of Columbus, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried at Columbus, Ohio, on September 11, 1992. The charge was filed on March 23, 1992, by the Union, Sheet Metal Workers' International Association, Local Union No. 24, AFL–CIO. The complaint, issued on May 4, 1992, alleged that the Respondent, Spillman Company, failed and refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by withdrawing recognition of the Union as the exclusive collective-bargaining representative of the employees. The Respondent's answer, filed on May 18, 1992, admitted the jurisdictional allegation in the complaint and denied the commission of any unfair labor practices, stating that the Union had waived, abandoned, relinquished, and disclaimed its status as exclusive collective-bargaining representative of the Company's employees.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Spillman Company, is a corporation engaged in the manufacture of forms and equipment for the concrete industry. With sales of goods valued in excess of $50,000 directly to points outside the State of Ohio, the Company is admittedly engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Sheet Metal Workers' International Association, Local Union No. 24, AFL–CIO, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

Facts

A representation election was conducted on January 18, 1990, among the Company's employees in the following bargaining unit:

> All full-time and regular part-time hourly production and maintenance employees including shipping/receivers, but excluding all office clerical employees, estimators, sales employees, sales supervisors, sales managers, managers, foremen, the plant manager, guards and all other supervisors as defined in the Act.

The tally of ballots showed 11 votes for the Union, 7 votes against it, and 1 challenged ballot. The Union was accordingly certified as the exclusive representative on August 17, 1990 (G.C. Exh. 2). The union negotiators, consisting of David Booth, the Union's business agent, and several employees, met with the Company's spokesman, Gregory Scott, an attorney, on 18 occasions between October 15, 1990, the day of the first bargaining session and July 1, 1991, when the last meeting was held (Tr. 10, 41, and 4; G.C. Exh. 2).

During the last negotiation meeting on July 1, the Company presented its ''final offer'' which contained all the items to which the parties had agreed and certain provisions dealing with insurance and wages which remained contested (G.C. Exh. 2; Tr. 13, 42–43). For example, the final offer provided for wage increases of 25, 20, and 15 cents for the employees who would be divided into the three groups based on their performance (Tr. 13, 47). The Union regarded the wages as too low and the offer as unacceptable (Tr. 14, 16, and 43). The Union so informed the Company and expressed confidence that there would be ''some movement'' (Tr. 17). The Union fully intended to continue the bargaining process but the Respondent declined. Attorney Scott testified as follows (Tr. 48): ''I don't know if those are my exact words, but I think he did make an overture about scheduling another meeting after we gave him the final on that day, on July 1st, and I said, 'There's no need to meet' to discuss any further. If you have questions about it, give me a call. Or if you accept it, just sign and send it to me.''

On the same day, Union Negotiator Booth met with the negotiating committee composed of several employees to discuss the final offer and to explore the employees' options. Booth told them that they ''could go out on strike and try to get the company that way,'' but he also cautioned them that he ''had no jobs to offer them if the company replaced them'' (Tr. 16). He hoped that ''if things got better down the road'' he could offer the key employees union jobs to improve his bargaining position (Tr. 17).

Two weeks later, Booth spoke by telephone to two members of the bargaining committee and told them that the parties needed some time to cool off because ''the Company didn't look like it was coming around'' (Tr. 18). Booth testified that he attempted to call Scott sometime in August and again in October and left a message when he was unable to reach him (Tr. 19). In his testimony, Scott denied receiving any messages about Booth's telephone calls to him in August or October (Tr. 44–45).[1]

[1] Both witnesses appeared to me to be credible. I believe that Booth tried to call Scott and I also believe Scott's testimony that he

On September 1, 1991, the Respondent implemented wage increases for the bargaining unit employees (G.C. Exh. 2). On January 14, 1992, Booth again called Scott's office and left a message. Scott returned the call on January 17, 1992 (Tr. 20, 43). During the telephone conversation, Booth requested a meeting, but Scott replied that he was unsure whether he still represented the Respondent (Tr. 21, 43). In a letter, dated January 27, 1992, to the Union, the Respondent's president, Theodore Coons, acknowledged Booth's inquiry stating, inter alia, as follows (G.C. Exh. 3):

> It is the position of the Spillman Company that the Sheet Metal Workers no longer represents the bargaining unit employees at our Company, as we have heard nothing from you since the Company gave you its last offer on July 1, 1991.
>
> In the interviewing period, there has been an across-the-board change in wage, a complete semi-annual review of all our associates, and the imposition of merit increases as warranted by performance.
>
> Furthermore, a significant number of new associates have joined the company since the last negotiating session, and well over half of them have joined the company since the representation election. You have not even held meetings with them since last summer.

The parties stipulated that the Union did not meet with the bargaining unit members between July 2, 1991, and January 1992 (G.C. Exh. 2). The foregoing summary of the record presents the issue whether the Respondent properly withdrew recognition from the Union.

Analysis

A union may loose its bargaining rights by waiver or by a loss of majority status. A waiver must be clear and unmistakable and will not readily be implied. *Peerless Publications*, 231 NLRB 244 (1977); *New York Mirror*, 151 NLRB 834 (1965). Moreover, an employer who doubts a union's majority status must overcome the presumption of an incumbent union's majority status. In this regard, ''an employer must show by a preponderance of the evidence either actual loss of majority support or objective factors sufficient to support a reasonable and good-faith doubt of the union's majority'' *Laidlaw Waste Systems*, 307 NLRB 1211 (1992). Here, the Union neither waived its bargaining rights by a hiatus of approximately 6 months of inactivity, nor did the Respondent show a good-faith doubt of the Union's majority support. The record shows initially that the Union fully intended to continue the negotiations even after it was presented with the Company's final offer on July 1, 1991. The Respondent however, informed the Union that further negotiations would be futile and unnecessary. This scenario belies any indication that the Union waived its bargaining history. Furthermore, the Union's strategy, clearly communicated by Booth to the employee's bargaining committee, was to wait until the Union could afford to offer key employees jobs in the event the Employer were to replace striking employees. In short, the Union hoped that a hiatus of time would improve its bargaining posture in the face of the Respondent's perceived intransigence. Finally, even if it is assumed that Booth made no contact with Respondent's negotiator, the record shows that Booth initiated the attempt in January 1992 to resume the negotiations. It is clear therefore that the Union did not waive its bargaining rights because of the months' long hiatus.

Neither should the Respondent have reasonably assumed that the Union had lost its majority status among the unit employees. To be sure, the Union held no meetings with the employees, and it did not protest the implementation of a pay increase, but during that time ''no employee of Respondent's expressed to Respondent the desire that the Union no longer represent them'' (G.C. Exh. 2). In spite of some turnover of employees at the Respondent's facility, the General Counsel properly demonstrated that at least 5 of the original 19 employees on the *Excelsior* list of employees were still employed by the Respondent (R. Exh. 1; Tr. 56). In addition, two other employees, Ernest Maynard, who underwent surgery, and Ronald Riddle, who was involved in an accident, must be counted as employees. Of the 17 employees who were on the Respondent's payroll in January when the Respondent withdrew recognition, 7 or 40 percent were employees at the time of the Union's certification. Considering that newly hired employees are presumed to support the Union in the same ratio as those they replaced, it is clear that the Respondent could not demonstrate a reasonable doubt based on the composition of his work force. Moreover, there was no evidence of employee disaffection with the Union. The inquiries by one of the employees directed at the Respondent's president whether he had heard from the Union does not reveal any waning union support (Tr. 54).

Finally, the Union's inactivity for the approximately 6 months, assuming that Scott did not receive Booth's telephone messages, does not entitle the Respondent to assume that the Union had waived its bargaining rights, nor does it support a reasonable and good-faith doubt of the Union's continued majority status. As already indicated, the Respondent was aware of the Union's attempt in July to continue the negotiations because it found the final offer unacceptable. Even though the Union expressed hope that some movement was possible in the negotiations, the Respondent foreclosed any further meetings. Under these circumstances it was unreasonable for the Respondent to hope that the Union would somehow just go away. In any case, the Union's initiation of contact between the parties certainly removed all doubt about the Union's continued determination. Having examined the totality of the circumstances, I find that the Respondent has failed to show by a preponderance of the evidence objective factors sufficient to support a reasonable and good-faith doubt of the Union's majority.

CONCLUSIONS OF LAW

1. Spillman Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers' International Association, Local Union No. 24, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union was certified as the exclusive collective-bargaining representative of the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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did not receive any messages. It is possible that the recipient of the calls failed to forward the messages.

> All full-time and regular part-time hourly production and maintenance employees including shipping/receiving but excluding all office clerical employees, estimators, sales employees, sales supervisors, sales managers, managers, foremen, the plant manager, guards and all other supervisors as defined in the Act.

4. By withdrawing recognition from and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees employed in the unit set forth above, the Respondent violated Section 8(a)(1) and (5) of the Act.

5. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, I recommend that it be required to cease and desist therefrom and to take other actions designed to effectuate the purposes and policies of the Act. I recommend that the Respondent be required to recognize and bargain collectively in good faith with the Union as the exclusive bargaining representative of the unit employees and that it be required, on agreement, to embody the terms of the agreement in a signed, written contract. I will also recommend that the Respondent be required to post a Board notice advising its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended[2]

ORDER

The Respondent, Spillman Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition of the Union and refusing to recognize and bargain collectively in good faith with Sheet Metal Workers' International Association, Local Union No. 24, AFL–CIO as the exclusive collective-bargaining representative of employees in the above-described unit.

(b) By any like or related means interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively in good faith with Sheet Metal Workers' International Association, Local Union No. 24, AFL–CIO as the exclusive representative of its unit employees, and, if agreement is reached, embody the terms of the agreement in a written signed document.

(b) Post at the Respondent's Columbus, Ohio facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition of the Union or refuse to recognize and bargain in good faith with Sheet Metal Workers' International Association, Local Union No. 24, AFL–CIO as the exclusive collective-bargaining representative in the following appropriate bargaining unit:

> All full-time and regular part-time hourly production and maintenance employees including shipping/-receivers, but excluding all office clerical employees, estimators, sales employees, sales supervisors, sales managers, managers, foremen, the plant manager, guards and all other supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively with Sheet Metal Workers' International Association, Local Union No. 24, AFL–CIO as the exclusive representative of employees employed at our Columbus, Ohio bargaining unit and, if agreement is reached, embody the terms of the agreement in a written signed document.

SPILLMAN COMPANY